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No. 86-1455

In the Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL MARCOCCIO, et al.,
PETITIONERS,

v.

DONNA CROSSMAN, et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' RESPONSE TO PETITION FOR CERTIORARI

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Questions Presented

Respondents accept Petitioners' statement in regard hereto.

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Opinions Below

Respondents accept Petitioners' statement in regard hereto.

Jurisdiction

Respondents accept Petitioners' statement in regard hereto.

Statutes and Rules Involved

Respondents accept Petitioners' statement in regard hereto.

Statement of the Case

On or about June 8, 1984, Plaintiffs/Respondents Daryl and Donna Crossman, on behalf of themselves and their two minor children, Ian and Krista, filed suit against five individual police officers of the Providence Police Department, the department itself and the chief of the department, pursuant to the provisions of 42 U.S.C. Section 1983. On August 29th, 1984, Defendants filed an answer with the court and, in addition, submitted to Plaintiffs an Offer of Judgment in the amount of $26,000.00, inclusive of all costs, interest and attorneys' fees that had accrued up to that date. The Offer was submitted on behalf of all Defendants, including the City of Providence and the chief. Plaintiffs did not accept the offer. Discovery had not commenced. Shortly before trial, Plaintiffs entered into a stipulation dismissing the claims against the City and the chief. Trial then began before Chief Judge Francis J. Boyle in the United States District Court for the District of Rhode Island. Judgment was entered for the Plaintiffs against each of the five individual police officers; the total judgment was $5,010.00, almost $21,000.00 less than that offered by Defendants in the Offer. Plaintiffs also prevailed on the police officers' counterclaims for assault.

Before judgment was entered, Petitioners filed with the District Court a Bill of Costs, pursuant to the provisions of 28 U.S.C. Section 1920, which delineates those items which may be taxed, and pursuant to the provisions of F.R.Civ.P. 68. As part of their Bill, Petitioners requested the sum of $10,902.50 in attorneys' fees to be taxed as part of the costs. Respondents duly objected thereto.

The District Court heard oral argument by the parties on October 28, 1985. Respondents strenuously objected to the inclusion of attorneys' fees as part of Defendants' costs, arguing that such inclusion would contravene existing statutory and case law, and violate public policy as established by Congress. *Marek* v. *Chesny*, 473 U.S. 1 (1985), 105 S.Ct. 3012, 87

L.Ed.2d 1, it was argued, precludes Plaintiffs from recovering their own attorneys' fees pursuant to 42 U.S.C. Section 1988. The Crossmans argued that *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) governed this case, as their claim was not frivolous because the Crossmans prevailed on the merits.

The District Court entered an order awarding Petitioners their Post-Offer of Judgment costs; included therein is an award of attorneys' fees as part of the costs. In its opinion the Court held that this action was governed by the decision of the Supreme Court in *Marek* v. *Chesny*, *supra*, and that, in accordance with that decision, Defendants/Petitioners are entitled to attorneys' fees. *Crossman* v. *Marcoccio*, 108 F.R.D. 437 (D.R.I. 1985). The Court awarded Defendants' Post-Offer of Judgment costs totalling $880.50 and awarded Post-Offer Attorneys' Fees totalling $10,902.50, the exact amount requested by Defendants. The District Court took no evidence as to the Respondents' ability to pay those costs.

The United States Court of Appeals for the First Circuit reversed the decision and award of the District Court with respect to attorneys' fees. It held that the trial court's award of attorneys' fees was inconsistent with the law as enunciated by *Marek*. Such an award was not "properly awardable" in this case because Petitioners were not prevailing parties. According to the First Circuit, the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, permits an award of attorneys' fees, as part of the costs, to a prevailing party; as Petitioners were not prevailing parties, such an award was not "properly awardable" under *Marek*. *Crossman* v. *Marcoccio*, 806 F.2d 329, 334 (1st Cir. 1986). Therefore, attorneys' fees are not subject to the cost shifting provisions of F.R.Civ.P. 68 *Id.* "To hold otherwise", the First Circuit held, "would fly in the face of the Supreme Court's carefully crafted decision in *Marek*, a case that . . . must control our decision today." *Id.*

Reasons Why the Petition Should Be Denied

I. The Decision of the Court of Appeals Is the Correct Application of This Court's Decision in *Marek*.

In *Marek* v. *Chesny*, *supra*, this Court held that a prevailing civil rights plaintiff, who recovers an amount at trial less than that contained in an offer of judgment under Rule 68, may not recover attorneys' fees under 42 U.S.C. Section 1988. It held that the word "costs", as given in the last line of Rule 68, encompasses "all costs properly awardable under the relevant substantive statute or other authority". *Marek*, 105 S.Ct. at 3017. Section 1988 defines attorneys' fees "as part of the costs", so this Court ruled in *Marek* that the terms of Rule 68 mandatorily preclude an award of attorneys' fees to the plaintiff.

In its ruling in the case at bar, the Court of Appeals took note of two key words, that is, the words "properly awardable", noting that this Court also stressed their importance. *Crossman* v. *Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986). The Court of Appeals said, that, even had they not been stated, the appellate court would have implied their existence. *Id.* The "pertinent inquiry", the lower court said, is whether the attorneys' fees awarded to petitioners were "properly awardable" under Section 1988. *Id.*

The Court of Appeals set forth two reasons as to why the District Court's attorneys' fees awards were not properly awardable. First, Section 1988 awards fees to a *prevailing party*, which, it is clear beyond all questioning, Petitioners were not. *Id.* at 334. Petitioners were unsuccessful Defendants in this case—not successful Plaintiffs, as they were in *Marek*. Therefore, Section 1988 is inapplicable. Secondly, this Court has already held that a Defendant may not recover attorneys' fees from a plaintiff unless he meets the standards set forth in *Hughes* v. *Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (per curiam) and *Christiansburg Garment Co.* v.

EEOC, 434 U.S. 412, 421 (1978), that is, unless plaintiff's civil rights action was "frivolous, unreasonable, or without foundation". *Christiansburg*, 434 U.S. at 421. As the Court of Appeals correctly stated, "[i]n the instant case, there is absolutely no reason to believe that [respondents'] case was frivolous or meritless; indeed, [respondents] 'prevailed' at trial". *Crossman*, 806 F.2d at 334.

The Court of Appeals' decision in the case at bar is not inconsistent with *Marek*. It is, instead, a logical application of *Marek*. *Marek* clearly holds that Rule 68 encompasses all costs "properly awardable" under the relevant substantive statute; it is clear that Section 1988 awards attorneys' fees only to prevailing parties, and it is equally beyond question that Petitioners are not a prevailing party. Hence, under the relevant statute, Section 1988, attorneys' fees are not awardable to Petitioners. Nor was Respondents' cause of action frivolous, unreasonable or without foundation, considering the jury's verdict in favor of Respondents. Accordingly, this is not an issue of an important question of federal law; this is a case in which a lower court has correctly applied a rule of law already handed down by this Court. As this case does not present a question of sufficient importance, this Court should reject the Petition for Certiorari. There is no conflict with any other Circuit Court on this issue.

The only two cases that have yet been published on the question presented are in agreement as to the outcome. *See*, *Crossman*, 806 F.2d at 333-34; *Adams* v. *Wolff*, 110 F.R.D. at 293-94. Accordingly, this Court should deny the Petition for Certiorari at this time.

Conclusion

For the reasons as stated in the foregoing argument, this Court should deny the Petition for Certiorari in the case at bar.

By their Attorneys,

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